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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER NEIL GLEASON,

Defendant and Appellant.

E063256

(Super.Ct.No. RIF1306276)

OPINION

APPEAL from the Superior Court of Riverside County. Helios (Joe) Hernandez, Judge. Affirmed with directions.

Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, and Lise S. Jacobson and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Christopher Neil Gleason pleaded guilty to a felony count of evading a peace officer (Veh. Code, § 2800.2), and admitted eight prior prison terms

(Pen. Code,<sup>1</sup> § 667.5, subd. (b)).<sup>2</sup> The trial court imposed an aggregate sentence of six years four months, consisting of 16 months for the felony count, and consecutive terms of one year each for five of the prison prior enhancements (priors 1-5), striking the remaining three prison prior enhancements (priors 6-8). Subsequently, defendant petitioned for relief pursuant to The Safe Neighborhoods and Schools Act, enacted by the voters as Proposition 47 in the November 2014 election. The trial court found that two of defendant's prior felony convictions were properly designated as misdemeanors pursuant to Proposition 47, but did not reduce defendant's sentence.

On appeal, defendant contends that the court erroneously failed to decide whether a third conviction, for transportation of a controlled substance in violation of Health and Safety Code section 11379, should be designated as a misdemeanor. Defendant further contends that the trial court misunderstood the scope of its discretion to reduce defendant's overall sentence in light of the designation of the convictions underlying some of his prison prior enhancements.

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<sup>1</sup> Further undesignated statutory references are to the Penal Code.

<sup>2</sup> Defendant's prior prison terms followed convictions for the following crimes: (1) August 4, 1994; evading a peace officer (Veh. Code, § 2800.2); (2) February 26, 1997, evading a peace officer (Veh. Code, § 2800.2); (3) October 5, 1998, vehicle theft (Veh. Code, § 10851); (4) November 19, 1999, receiving stolen property (Pen. Code, § 496); (5) November 15, 2001, evading a police officer (Veh. Code, § 2800.2); (6) November 21, 2003, auto theft with a prior (Pen. Code, § 666.5); (7) July 12, 2005, possession of a controlled substance (Health & Saf. Code, § 11377; and (8) January 5, 2007, transportation of a controlled substance (Health & Saf. Code, § 11379). In this opinion, we will sometimes refer to defendant's priors by these numbers, which is how they were numbered in the information.

We find that defendant was not entitled to have a third conviction designated as a misdemeanor, because the conviction at issue, for violation of Health and Safety Code section 11739, is not an offense eligible for designation as a misdemeanor under Proposition 47. We further find that Proposition 47 does not apply retroactively to allow the striking of a sentence enhancement imposed in a pre-Proposition 47 final judgment based on an underlying felony conviction subsequently designated a misdemeanor under Proposition 47. As such, the trial court was correct that defendant's sentence should not be reduced. We nevertheless remand with instructions, for the limited purpose of correcting certain procedural errors made by the trial court in reaching that correct result.

## I. FACTS AND PROCEDURAL BACKGROUND

On November 12, 2013, defendant pleaded guilty, and the trial court imposed sentence, as described above. On November 20, 2014, defendant, acting in propria persona, filed his petition for resentencing requesting pursuant to Proposition 47. Plaintiff was not specific as to the relief requested, asserting only that his conviction offense and "some" of his prison priors were now misdemeanors.

On March 13, 2015, the trial court held a hearing on the petition. Defendant (now represented by counsel) and the People agreed that two of defendant's prior convictions—number 4, the 1999 conviction for receiving stolen property, and number 7, the 2005 conviction for possession of a controlled substance—were properly reduced to

misdemeanors pursuant to Proposition 47.<sup>3</sup> Defendant further contended that the redesignation of the convictions underlying some of his prison prior enhancements required a concomitant reduction in his sentence in the current matter. The trial court—erroneously referring to the previously stricken priors 6-8 as stayed<sup>4</sup>—ordered that prior 4 be “substitute[d] out,” so that the enhancements for priors 1, 2, 3, 5, and 6 would be imposed, enhancements 4, 7 and 8 would be stricken, and the sentence would remain six years four months.

## II. DISCUSSION

### **A. Defendant’s Felony Conviction for Transportation of a Controlled Substance Was Not Eligible for Designation as a Misdemeanor.**

Defendant contends that the trial court erred by failing to decide whether his 2007 conviction for transportation of a controlled substance in violation of Health and Safety Code section 11379. Defendant argues that if he could show he was transporting a controlled substance for personal use, rather than for sale, his conviction would fall within the scope of Proposition 47, and that we should remand the matter for the trial court to make findings on that issue. Defendant is incorrect.

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<sup>3</sup> Defense counsel indicated during the hearing that prior number 7 had previously been redesignated as a misdemeanor by the trial court. No such order, however, appears in our record.

<sup>4</sup> The clerk’s minutes of defendant’s sentencing on November 12, 2013, erroneously describe three prison prior enhancements as having been stayed, inaccurately reflecting the trial court’s oral pronouncement of judgment, which ordered those priors stricken. The abstract of judgment was later corrected to reflect the striking of three of the eight prison prior enhancements.

“Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors). Proposition 47 (1) added chapter 33 to the Government Code (§ 7599 et seq.), (2) added sections 459.5, 490.2, and 1170.18 to the Penal Code, and (3) amended Penal Code sections 473, 476a, 496, and 666 and Health and Safety Code sections 11350, 11357, and 11377.” (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Among other things, Penal Code section 1170.18 provides a mechanism for a person who has completed a sentence for a conviction of a felony “who would have been guilty of a misdemeanor under [Proposition 47] had [it] been in effect at the time of the offense” to apply to have the conviction designated as a misdemeanor. (Pen. Code, § 1170.18, subd. (f).)

Health and Safety Code section 11379 was not explicitly amended by Proposition 47, and transportation of a controlled substance is not a class of offenses explicitly redefined by Proposition 47. (E.g., Pen. Code, § 490.2 [redefining grand theft to exclude obtaining property by theft where value of the property does not exceed \$950, unless offense committed by certain categories of recidivists].) We find no support in the statutory language added or amended by Proposition 47 for the notion that it was designed “to reduce to a misdemeanor any offense involving drug possession and any drug-related offense that is not serious or violent,” as defendant would have it. Defendant therefore would have been guilty of a felony, not a misdemeanor, even if Proposition 47 had been in effect as of the date of his conviction for Health and Safety

Code section 11379. The Penal Code section 1170.18 mechanisms for reducing certain previous convictions therefore offer defendant no relief with respect to that conviction.

In defendant's reply brief, based on an appellate case that is no longer citable because a petition for review has been granted by the California Supreme Court, defendant analogizes between transportation of a controlled substance in violation of Health and Safety Code section 11379 and theft of access card account information, in violation of Penal Code section 484e, subdivision (d). He argues that, even though Penal Code section 484e is not one of the statutes explicitly amended or added by Proposition 47, the offense of violating section 484e, subdivision (d) nevertheless falls under Proposition 47, so Health and Safety Code section 11379 offenses should be treated similarly.

Defendant's argument, however, does not hold water. Section 484e, subdivision (d), defines a variety of grand theft: "Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person, without the cardholder's or issuer's consent, with the intent to use it fraudulently, is guilty of grand theft." Section 484e is not explicitly listed among Proposition 47's additions or amendments to California's statutory law in section 1170.18, subdivision (a). Nevertheless, section 490.2, added by Proposition 47, explicitly applies to section 484e, subdivision (d), redefining "any other provision of law defining grand theft" to be petty theft and a misdemeanor, where the stolen property falls below the threshold value of \$950, unless the offense was committed by defined categories of recidivists. (§ 490.2,

subd. (a).) There is no equivalent provision of Proposition 47 applicable to transportation of controlled substances.

To be sure, Health and Safety Code section 11379 has been amended since defendant was convicted of the offense. The amendment, however, was not under Proposition 47, but a different legislative enactment, which limited the offense of transportation of a controlled substance to transportation with the intent to sell. (Health & Saf. Code, § 11379, subd. (c), added by Stats. 2013, ch. 504, § 2, eff. Jan. 1, 2014.) That legislative enactment, however, included no provisions analogous to those of Penal Code section 1170.18, so as to allow previously convicted of the offense to obtain some benefit from the amendment.

Defendant also contends that his equal protection rights would be infringed if Proposition 47 is not interpreted to encompass persons convicted of transportation of a controlled substance, where they intended only personal use, not sale. Not so. If defendant were charged with committing the offense after January 1, 2014, the prosecution would have to prove the transportation of a controlled substance was for sale. (Health & Saf. Code, § 11379, subd. (c).) The prosecution did not have to do so when defendant was convicted in 2007. (Health & Saf. Code, former § 11379, subd. (c) (eff. Jan. 1, 2002, to Sept. 30, 2011.) Defendant's equal protection rights, however, are not implicated by this change. “[T]he 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.” (*People v. Floyd* (2003) 31 Cal.4th 179, 191, quoting *Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505.)

In short, Health and Safety Code section 11379 convictions are not eligible for reduction or redesignation as misdemeanors under Proposition 47. Defendant's arguments resting on a contrary conclusion are rejected.

**B. Proposition 47 Does Not Authorize Striking of a Sentence Enhancement Imposed in a Pre-proposition 47 Final Judgment Based on an Underlying Felony Conviction Subsequently Designated a Misdemeanor.**

Defendant contends that the trial court erroneously failed to exercise its discretion to reduce defendant's sentence, because several of the felony convictions underlying his prison prior enhancements had been reduced to misdemeanors. This argument fails, because Proposition 47 does not authorize the striking of a sentence enhancement on that basis.

The "emerging consensus" among California appellate courts is that Proposition 47 does not apply retroactively. (*People v. Williams* (2016) 245 Cal.App.4th 458, 470.) On this view, a felony conviction that has been redesignated a misdemeanor pursuant to Proposition 47 must be treated as a misdemeanor "for all purposes" (with specified exceptions) from the date of the redesignation forward. (§ 1170.18, subd. (k).) Nevertheless, Proposition 47 "does *not* apply retroactively to allow the redesignation, dismissal, or striking of a sentence enhancement imposed in a [pre-Proposition 47] final judgment based on an underlying felony conviction subsequently redesignated a misdemeanor under section 1170.18." (*People v. Carrea* (2016) 244 Cal.App.4th 966, 977.) Defendant has presented no persuasive reason why we should find differently. (See *People v. Gipson* (2013) 213 Cal.App.4th 1523, 1529 [in the absence of "good

reason to disagree,” we “typically follow the decisions of other appellate districts or divisions”].)

In this case, the trial court did in fact strike a sentence enhancement—prior 4—on the basis that it had been reduced to a misdemeanor. It then purported to “substitute” another prison prior allegation that had previously been stricken, but which was not eligible for reduction pursuant to Proposition 47—prior 6—in its place, leaving defendant’s total sentence unchanged. This substitution was procedurally irregular, and unauthorized by Proposition 47 or any other basis in law, even if the end result—no change to defendant’s sentence—was correct.

Instead, the trial court should have entered an order designating defendant’s 1999 conviction for receiving stolen property and 2005 conviction for possession of a controlled substance to be misdemeanors pursuant to Proposition 47. The trial court should have denied defendant’s request for resentencing in all other respects, leaving the initial sentence intact—that is, a sentence of 16 months for the felony count, and consecutive terms of one year each for five of the prison prior enhancements (priors 1-5), with the remaining three prison prior enhancements (priors 6-8) stricken. We therefore remand the matter for the limited purpose of entering an order to that effect.

### III. DISPOSITION

The trial court is directed to vacate its March 13, 2015 order regarding defendant’s petition for relief pursuant to Proposition 47, and its September 8, 2015 order, correcting the March 13, 2015 order nunc pro tunc. The trial court is further directed to enter a new order (1) designating defendant’s November 19, 1999 conviction for receiving stolen

property, and his July 12, 2005 conviction for possession of a controlled substance to be misdemeanors, pursuant to section 1170.18, subdivisions (f) and (g); (2) denying defendant's petition for resentencing in all other respects; and (3) ordering the November 12, 2013 minutes of defendant's sentencing hearing be corrected nunc pro tunc to reflect priors 6, 7 and 8 as stricken, rather than stayed.<sup>5</sup> In all other respects, the order appealed from is affirmed.

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HOLLENHORST

J.

We concur:

RAMIREZ

P. J.

MCKINSTER

J.

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<sup>5</sup> The corrected abstract of judgment, prepared pursuant to the September 8, 2015 minute order, only reflects that 5 prison prior enhancements were imposed; it does not indicate which five of the eight prison prior enhancements to which defendant pleaded guilty were imposed. As such, though the trial court's minutes should be corrected as described herein, no further amended abstract of judgment need be prepared.